

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL H. LECLAIR and DEPARTMENT OF THE INTERIOR,
FISH & WILDLIFE SERVICE, Sandusky, Ohio

*Docket No. 95-2427; Submitted on the Record;
Issued January 13, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained recurrences of disability commencing October 19, 1989, April 7, 1991 and December 8, 1993, causally related to his accepted September 18, 1985 employment-related injury; (2) whether appellant met his burden of proof in establishing that he sustained a traumatic injury in the performance of duty on April 7, 1991, as alleged; and (3) whether the Office of Workers' Compensation Programs, by its April 7, 1995 decision, abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case records in the present appeal and finds that in its April 7, 1995 decision, after a merit review, (OWCP No. A9-297112) the Office properly determined that appellant failed to establish that he sustained recurrences of disability commencing October 19, 1989, April 7, 1991 and December 8, 1993 causally related to his accepted September 18, 1985 employment-related injury; that the Office, in its January 9, 1995 decision, (OWCP No. A9-391677) properly determined that appellant failed to meet his burden of proof in establishing that he sustained a traumatic injury in the performance of duty on April 7, 1991, as alleged; and in its April 7, 1995 decision, (OWCP No. A9-391677) the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

In this case appellant appeals two claims. On December 12, 1993 appellant filed a claim for recurrences of disability, alleging that he sustained recurrences of disability commencing October 19, 1989, April 7, 1991 and December 8, 1993 causally related to his accepted September 18, 1985 employment-related injury. The Office denied appellant's claim on March 22, 1994 (OWCP No. A9-297112), finding that the evidence of record failed to establish that the claimed recurrences were causally related to the September 18, 1985 employment-

related injury.¹ By letter dated February 27, 1995, appellant requested reconsideration of the March 22, 1994 decision. By decision dated April 7, 1995, after a merit review, the Office denied appellants request for reconsideration finding that the evidence submitted was insufficient to warrant modification of the prior decision.

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, and that the claim was filed within the applicable time limitations of the Act.³ An individual seeking disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged,⁴ that the injury was sustained while in the performance of duty,⁵ and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁷

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury. This burden includes the necessity of furnishing medical evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the accepted employment injury and supports that conclusion with sound medical reasoning.⁸

The medical evidence submitted in support of appellant's claim for recurrences of disability commencing October 19, 1989, April 7, 1991 and December 8, 1993, consists of a February 9, 1994 invoice showing that appellant received back massage therapy on that day; a September 1, 1994 office note by Dr. Michael J. Felter, a Board-certified orthopedic surgeon; and a November 10, 1994 report by Dr. Felter.

¹ The Office stated that on October 19, 1989 appellant sustained another work injury, contusions to his face, scalp and neck and that the claim was no time lost and was destroyed. There was no reference to a back injury which was the 1985 accepted injury.

² 5 U.S.C. §§ 8101-8193.

³ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *Robert A. Gregory*, 40 ECAB 478 (1989).

⁵ *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *Steven R. Piper*, 39 ECAB 312 (1987).

⁷ *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *Lourdes Davila*, 45 ECAB 139 (1993); *Louis G. Malloy*, 45 ECAB 613 (1994).

In the September 1, 1994 office note, Dr. Felter stated that he saw appellant that day for complaints of pain in his lower back. He went on to say, "Apparently, he injured himself in 1991 at work. He says he has had no specific treatment, but he filed the forms at the time." Dr. Felter further stated, "On further questioning, [appellant] apparently suffered a reinjury of his back in April of 1991, and he had some intermittent pain." He diagnosed low back strain, degenerative disc disease of lumbosacral spine, lumbosacral radiculopathy and spondylolisthesis of L5-S1. Dr. Felter never mentions an incident in October 1989 or December 1993, and never saw appellant for a 1991 injury. His only knowledge of a 1991 injury was that appellant told him that he sustained an injury in 1991. Dr. Felter failed to address any disabling recurrence of disability either in 1989, 1991 or 1993 nor did he causally relate recurrences on those dates to the September 18, 1985 accepted employment-related injury. Moreover, he failed to link appellant's current diagnosed conditions to the September 18, 1985 employment-related injury, *i.e.*, Dr. Felter failed to explain how appellant's current condition resulted from a lumbosacral strain in 1985. Therefore, his September 1, 1994 office note is insufficient to establish appellant's recurrence of disability claim.

In the November 10, 1994 report, Dr. Felter stated that "I first saw [appellant] in October 1985 after he suffered an injury to his back at work." He went on to say that "after a period of time and treatment, [appellant's] symptoms eventually improved to the point he was released from my care on January 6, 1986." Dr. Felter further stated "I did not see [appellant] again until September 1, 1994. He apparently suffered a reinjury to his back in 1991, and now is complaining of persistent and ongoing pain." He stated, "It is my opinion that [appellant] has developed a progressive degenerative disc disease with suggestion of early radiculopathy. It is my opinion that his back problems are ongoing and a continuation of the injury from 1985, as well as 1991." While Dr. Felter opined that appellant's back problems are ongoing and a continuation of the injury from 1985 as well as 1991, he failed to provide supportive rationale. Dr. Felter never mentions an October 19, 1989 or December 8, 1993 incident and did not provide any opinion concerning injuries on those dates. Dr. Felter never treated appellant for a 1991 injury and although he opined that appellant's current back problems are causally related to his 1985 accepted lumbosacral sprain he failed to provide a rationalized medical opinion based on a complete medical background, as he had not seen or treated appellant from 1986 to 1994. Dr. Felter failed to explain how appellant's diagnosed conditions in 1994 were causally related to the accepted September 18, 1985 employment-related injury.⁹ Therefore, Dr. Felter's November 10, 1994 report is also insufficient to establish appellant's recurrence of disability claim. By letter dated February 16, 1994, the Office advised appellant of the specific type of evidence needed to establish his recurrence of disability claim, but such evidence was not submitted. The Board finds that appellant failed to meet his burden of proof.

Appellant also filed a claim on April 8, 1991 which was received by the Office on July 8, 1994. Appellant alleged that on April 7, 1991 while in official duty status¹⁰ at a federal

⁹ *Kathryn Haggerty*, 45 ECAB 383 (1994) (where the Board found that to establish a causal relationship between the condition or any attendant disability claimed and the employment incident, rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship must be submitted).

¹⁰ The employing establishment does not dispute that appellant was in official-duty status.

law enforcement training center, he was participating in the required physical endurance battery tests when he over stretched during a flexibility test and pulled a muscle and ligament in his lower back, and lower left side. By decision dated January 9, 1995, the Office found that the incident occurred as alleged but that the evidence was insufficient to establish that an injury resulted from the incident.

To support his traumatic injury claim, appellant submitted the same November 10, 1994 report by Dr. Felter that was submitted in his recurrence claim; and Dr. Felter's office notes covering October 3, 1985 through January 6, 1986 and September 1, 1994.

In the November 10, 1994 report, Dr. Felter stated that "I first saw [appellant] in October 1985 after he suffered an injury to his back at work." Dr. Felter went on to say that "after a period of time and treatment, [appellant's] symptoms eventually improved to the point he was released from my care on January 6, 1986." Dr. Felter further stated "I did not see [appellant] again until September 1, 1994. He apparently suffered a reinjury to his back in 1991, and now is complaining of persistent and ongoing pain." Dr. Felter stated, "It is my opinion that [appellant] has developed a progressive degenerative disc disease with suggestion of early radiculopathy. It is my opinion that his back problems are ongoing and a continuation of the injury from 1985, as well as 1991." Dr. Felter's office notes referred to three visits in 1985, one visit in 1986 and one visit in 1994.

No medical evidence was submitted to support appellant's claim that he sustained a traumatic injury as a result of the April 7, 1991 employment incident. In the November 10, 1994 report, Dr. Felter opined that appellant's back problems were ongoing and a continuation of the injury from 1985 as well as 1991. However, in 1985 Dr. Felter diagnosed appellant with low back strain and released appellant from his care in January 1986. Dr. Felter never treated appellant for a 1991 injury and neither conducted any medical tests nor reviewed any medical evidence to support such an injury. Dr. Felter's opinion that appellant's ongoing back problems were a continuation of a 1991 injury was based strictly on appellant's statement that he sustained such an injury. Appellant's statement was given to Dr. Felter during an office visit on September 1, 1994, nearly three and a half years later. Dr. Felter failed to provide a history of injury, nor any medical rationale to support his opinion, *i.e.*, Dr. Felter failed to explain how appellant's diagnosed condition in 1994, degenerative disc disease, is linked to the April 7, 1991 employment incident. Therefore, Dr. Felter's report is insufficient to establish appellant's traumatic injury claim. His office notes referred to office visits in 1985 and 1986 which were prior to the April 7, 1991 employment incident and a 1994 visit during which appellant mentioned he sustained a back injury in April 1991. The office notes failed to support that appellant sustained an injury as a result of the April 7, 1991 employment incident. Therefore, Dr. Felter's office notes are also insufficient to establish appellant's traumatic injury claim. By letter dated July 29, 1994, the Office advised appellant of the specific type of evidence needed to support his claim, but such evidence was not submitted. Therefore, the Board finds that the evidence of record is insufficient to meet appellant's burden of proof.

The Board further finds that in its decision dated April 7, 1995, the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of his claim on the merits under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or a fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.¹¹ Section 10.138(b)(2) provides that when application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹²

In his February 27, 1995 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or a fact not previously considered by the Office. In support of his reconsideration request, appellant submitted a September 1, 1994 office note from Dr. Felter and a November 10, 1994 report by Dr. Felter, both of which had been submitted previously and considered prior to the Office decision dated January 9, 1995.¹³ Thereby making them insufficient to warrant review of the prior decision. Also submitted were affidavits from two of appellant's supervisors. As the issue for determination was medical in nature, the affidavits were irrelevant, immaterial and insufficient to warrant review of the prior decision.

As appellant's February 27, 1995 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that that Office did not abuse its discretion in denying that request.

¹¹ 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

¹² 20 C.F.R. § 10.138(b)(2).

¹³ *Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.)

The decisions of the Office of Workers' Compensation Programs dated April 7, 1995 (OWCP No. A9-297112), April 7, 1995 (OWCP No. A9-391677) and January 9, 1995 (OWCP No. A9-391677) are affirmed.¹⁴

Dated, Washington, D.C.
January 13, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ Since appellant has not established his claims for recurrence of disability or traumatic injury in this case, he is not entitled to medical benefits, as he has not established that any treatment received was or would be for a condition that resulted from an employment-related injury.